No. 83-2117

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,

and

ASSOCIATION OF AMERICAN RAILROADS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITIONERS' REPLY MEMORANDUM

NELSON J. COONEY
KENNETH E. SIEGEL
2200 Mill Rd.
Alexandria, Va. 22314
(703) 838-1857
Attorneys for
American Trucking
Associations, Inc., *et al.*

GEORGE KAUFMANN
(Counsel of Record)
ROBERT J. HIGGINS
JOAN M. DARBY
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700
Attorneys for
International Brotherhood
of Teamsters

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INDEX OF CITATIONS

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* Throughout this memorandum, "Pet." and "Pet. App." will refer to the Petition for Certiorari herein and the Appendix thereto; "Fed. Br." will refer to the Brief for the Federal Respondents in Opposition; "AAR Br." will refer to the Brief in Opposition of respondents Association of American Railroads, *et al.*

ARGUMENT

I.

A. The federal respondents state that they

> agree with the court below * * * that this "Court's opinions can most fairly be read as approving the *Commission's* interpretation of its statute" and that "the special circumstances doctrine in licensing was not held by the Court to be statutorily required, but rather simply a Court-approved Commission interpretation of its statute." [Fed.Br. 15, quoting Pet. App. 40a, court's emphasis]

They thus repudiate the interpretation of this Court's opinions which they previously, and successfully, urged upon this Court:

> It has long been established that the *Congressional* policy of opposition to railroad incursions into the field of motor carrier service" (*American Trucking Associations, Inc. v. United States*, 364 U.S. 1, 7) usually limits any motor carrier service performed by a railroad affiliate or subsidiary to service auxiliary or supplemental to its rail service. See *United States v. Rock Island Motor Transit Co.*, 340 U.S. 419. An unrestricted certificate, authorizing motor service unrelated to the railroad parent's rail service and in competition with independent truckers, may be granted only where "special circumstances" prevail.[1]

The foregoing is a succinct statement of the principal thesis of our petition herein—that the court below misread this Court's decisions when it treated the "special circumstances" doctrine as a *Commission* policy (which that agency is free to change at any time) rather than a

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[1] Motion to Affirm, p. 3 in No. 74-515, *B-H Transfer Co. v. United States* (emphasis added). The motion to affirm was granted, 420 U.S. 968.

Congressional policy (by which the Commission is bound). See Pet. 9-12.

B. The federal respondents grudgingly observe that, "as petitioners point out, certain passages in the Court's opinions can be viewed, when read in isolation, to suggest that the previous licensing standards represented a congressional requirement that the Court was recognizing and enforcing." (Fed. Br. 15). The phrase "certain passages" is hardly a fair description of the large portions of this Court's opinion in *American Trucking Assns. v. U.S.*, 364 U.S. 1 (*"ATA II"*) which we set forth at Pet. 10-11. In so doing, we were duly mindful that, as *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341, cited at Fed. Br. 15 illustrates, isolated statements in the opinions of this Court should not be treated as holdings. But the proposition that Congress adopted the "special circumstances" policy as its own and bound the Commission thereby is the very essence of the reasoning in *ATA II* (see especially 364 U.S. 15.) Neither of the respondents' briefs points to anything in the *ATA II* opinion (or any other) which is to the contrary.[2]

II.

The federal respondents would read back into *ATA II* the "general principle[] of administrative law that entrust[s] the construction of a statute to the responsible agency in the first instance" (Fed. Br. 15). That is the principle which the court below followed and which is stressed at Fed. Br. 10-12. But *ATA II* was actually de-

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[2] Indeed, each of the briefs in opposition quotes only a portion of a single sentence from *ATA II* "in isolation" (Fed. Br. 15); in both instances that same sentence is quoted by the Petition in full, and in its context. Compare Fed. Br. 14 quoting from 364 U.S. at 6-7 with Pet. 9 and AAR Br. 8 quoting from 364 U.S. at 11 with Pet. 10-11.

cided by applying a different, at least equally important "general principle[] of administrative law"—that on which we rely here (Pet. 12-14):

> The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.[3]

For, in *ATA II*, the Court said (in a paragraph more fully quoted at Pet. 11):

> [*W*]*e do not believe that the policy of the Act allows the Commission to* authorize service by Pacific Motor, limited only to points on the Southern Pacific line, simply because General Motors wants a contract carrier operation. * * * We do not condemn the wisdom of the Commission's action. *We simply say that the transportation legislation does*, and that the pardoning power in this case belongs to Congress. [364 U.S. at 15, emphasis added].

ATA II thus not only establishes that the court below has construed the Interstate Commerce Act in conflict with this Court's decisions, but illustrates, by directly pertinent example, that the court below accorded excessive deference to the Commission's decision.[4]

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[3] *American Ship Bldg. v. Labor Board*, 380 U.S. 300, 318, quoted at Pet. 14-15.

[4] The railroad respondents attribute to us the contention that the special circumstances doctrine is "rigid" (AAR Br. 5, 7). That is not our position. Plainly, as *ATA I* held, and *ATA II* reaffirmed, the Commission has considerable flexibility in determining what are "special circumstances" permitting railroads and rail affiliates to obtain motor carrier operating authority. But those cases also make clear that the Commission may not do what it has done here, which is to determine that such licenses may be granted without a showing of "special circumstances." That was the "error of law" which the Commission committed in *ATA II* (364 U.S. at 15), and again here.

III.

Point III of the Petition seeks review on the additional ground that the question presented is important to the economic health of the motor carrier industry. The practical significance of the Commission's ruling is distinct from the question of the soundness of the Commission's economic analysis to which respondents would assimilate it (Fed. Br. 13-14; AAR Br. 15-17). In other words, in Point III our submission is that the Commission's decision will have its intended effect of promoting competition between railroads and motor carriers not (as we say Congress intended) on the basis of the "inherent advantage of each mode of transportation" (49 U.S.C. § 10101 (a) (1)) but on the basis of individual railroads' financial ability to undertake and subsidize motor carrier operations. The federal respondents appear not to dispute that this will occur.[5]

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[5] The railroads question our use of comparative assets in showing that railroads have far greater resources than motor carrier operators and are therefore able to finance substantial motor carrier operations. (AAR Br. 16, n.15.) The objection is not well taken since assets reflect capital (either in liquid form or in borrowing power) which is available to large rail carriers who want to go into the trucking business. In any event, a comparison of annual revenue figures (which the railroads consider to be more relevant) leads to the same conclusion (see Pet. App. 2b). It has not been suggested that motor carriers have the financial capacity to operate as carriers by rail.

Lastly, we note, contrary to AAR Br. 16, n.15, that the appendices to the Petition are accurate. United Parcel Service was omitted because, as a carrier limited to transportation of shipments under one hundred pounds it is exempted from the statutory licensing provisions (see 49 U.S.C. § 10922(b)(4)(D)), and is therefore not affected by the challenged Commission policy. Neither PIE/Ryder (a motor carrier) nor the Union Pacific Railroad was on the *Fortune* list from which the appendix was drawn; we therefore do not understand the basis for the respondents' objection.

CONCLUSION

For the reasons stated in the Petition for a Writ of Certiorari and herein, the Petition should be granted.

Respectfully submitted,

NELSON J. COONEY
KENNETH E. SIEGEL
2200 Mill Rd.
Alexandria, Va. 22314
(703) 838-1857
Attorneys for
American Trucking
Associations, Inc., *et al.*

GEORGE KAUFMANN
(Counsel of Record)
ROBERT J. HIGGINS
JOAN M. DARBY
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700
Attorneys for
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of Teamsters